Date : 18.08.2020

To

Hon'ble the Chief Justice of India
and the Companion Judges
of the Supreme Court of India

Respected Judges,

We, the members of the Bar at Chennai, write this with a deep sense of anguish and disappointment at the judgment dated 14.08.2020 holding Advocate Prashant Bhushan guilty of contempt of the Supreme Court for having expressed his opinion about the Court's functioning.

An action for criminal contempt of scandalising the Court is an extraordinary one which impinges on the right to free speech and hence as Chief Justice Gajendragadkar said, "must always be exercised cautiously, wisely and with circumspection". Unfortunately, all of the above appear to be lacking in the instant action. The judiciary undermines the very Constitution that it serves to defend, when it takes coercive action to silence views that are critical of the institution.

The judiciary is not an elected body, yet its legitimacy is enhanced by public accountability. As stated by the Constitutional Court of South Africa in State Vs. Mamabolo (2001(5) BCLR 449)

> "*It is not just the public that has the right to scrutinize the judiciary, but the judiciary that has the right to have its activities subjected to the most rigorous critique.*"

Lawyers, being stakeholders and integral to the justice delivery system, have the unique privilege and duty to scrutinise the functioning of the Courts and act as conscience keepers of the judiciary through an audit of its functions. They are the interface between the public and the judiciary. The opinions expressed by a fearless Bar actually benefit the judiciary, as otherwise it has no mechanism to learn about people's opinion of its functioning. The judiciary does not function in a vacuum but in a political system impacting the lives of millions.

In recent times, issues of vital importance concerning erosion of democratic norms and basic rights of citizens including freedom of speech and personal liberty – demonetisation, alteration of the status of Jammu & Kashmir and consequential preventive detention/arrests, electoral bonds vitiating our election system, NRC, NPR, Citizenship Amendment Act, right to protest by citizens including students, communal riots, most importantly the impact of COVID-19 lockdown on the poor and in particular migrant workers came up before the Supreme Court. As civil society, media and legal fraternity followed these with keen interest, many, including former judges and lawyers have expressed their

disappointment at the lack of promptitude and attention that a Constitutional Court ought to have bestowed on such serious issues.

A few comments made by former judges about the decline in the constitutional role of the Supreme Court in checking executive excesses and protecting fundamental rights expressed through articles and media reports, speeches and interviews, are quoted below:

i) " *ADM Jabalpur will no longer be remembered as the darkest moment of the Supreme Court. That infamy now belongs to the Court's response to the preventable migrant crisis during the COVID-19 pandemic."*

["A Supreme failure", by Justice Gopal Gowda, Deccan Herald, 25.05.2020]

ii) "These and similar instances have led to the feeling among many that over the last couple of years, the court has been 'executivised'. This is a polite suggestion that the independence of the judiciary is in danger, through self-inflicted wounds and some inflicted by the executive."
["*Judicial Independence : Three Developments that Tell Us Fair is Foul and Foul is Fair*", *by Justice Madan B. Lokur, The Wire, 23.03.2020]*

iii) *"Over the past few months, constitutional rights and remedies were overlooked and socio-economic justice, a cornerstone in the preamble of our constitution, was disregarded. Some eminent members of the legal fraternity have already expressed dissatisfaction with the present-day functioning of the Supreme Court. Isn't that tragic or is it farcical?"*

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"Sorry, the court completely failed in this – forgot what public interest litigation is all about. If a grading is to be given, it deserves an F."

["*Supreme Court Deserves an 'F' Grade for its Handling of Migrants*", *by Justice Madan B. Lokur, The Wire, 28.05.2020]*

iv) *"Today, we find ourselves with a Supreme Court that has time for a billion-dollar cricket administration, or the grievances of a high-profile journalist, while studiously ignoring the real plight of millions of migrants…."*
["Failure to perform as a Constitutional Court", by Justice A.P.Shah, The Hindu, 25.05.2020.]

It may be recalled that four sitting Judges of the Supreme Court in an unprecedented move held a Press Conference on 12.01.2018 and said that "*the administration of the Supreme Court was not in order and many things which are less than desirable have happened in the last few months*." The Judges said that the Press Conference was necessitated by "*their responsibility to the institution and the nation*". Further they observed, "*unless this institution is preserved and it maintains its equanimity, democracy will not survive in this country or in*

any country" ["*Supreme Court Crisis: Business Line , 18.08.2018]*. Historians, scholars and other public figures have shared and expressed similar views.

These critical comments made in public interest about the Court's functioning and that of its Chief Justices have been circulated widely in print and online news portals. The Supreme Court has rightly not viewed them with disfavour.

As the Report of the Law Commission (UK) on Contempt of Court: Scandalising the Court (2012), endorsing a statement by Lord Pannick says,

> "*If confidence in the judiciary is so low that statements by critics would resonate with the public, such confidence is not going to be restored by a criminal prosecution in which judges find the comments to be scandalous or in which the defendant apologises."*

We as lawyers practising in Courts believe that the Supreme Court rests on surer foundations of Constitutionalism and will not wither in the heat of comments, rather will be responsive and thus reinforce people's faith.

However, we are deeply disturbed by the action taken against Prashant Bhushan, a lawyer of more than 30 years practice in the Supreme Court and who has espoused many causes in public interest, often against high executive functionaries. His tweets only reflect what other commentators have said. It is therefore rather alarming that the Supreme Court has found him guilty of contempt holding that his tweets cannot be said to be "fair criticism", are scurrilous, malicious and have a tendency to scandalise the Court. It is to be noted that both the tweets are in the context of concerns/opinions from a cross section of informed public about the latitude shown by the Court towards draconian executive actions and the general image of the judiciary that has been dented by the actions/inactions of judges.

The decision of the Supreme Court sends a chilling message to members of the Bar and the public, viz, "*do not criticise us or else face punishment*". This is a dangerous message against free speech.

We as members of the Bar, have a duty to contribute actively to an independent judicial system and the Rule of Law. Members of the Bar thus engage in debates and commentaries about the legal system and the judiciary. No system can thrive without 'nay' sayers, for often progressive reforms have emerged out of dissent. There are many among us who express differing views about the judicial system and the Courts or even the judges.

To us the proceedings against Prashant Bhushan appear to be a travesty of justice. That is our opinion. Firstly, Bhushan has been singled out for an opinion that has been shared and expressed by several others including sitting and former judges of the Supreme Court itself. Secondly, the hasty manner in which the proceedings took place, show a lack of adherence to principles of natural justice. In the very nature of things, a criminal contempt creates a stifling atmosphere for the respondent, because the Court is the complainant/victim, the prosecutor and the judge. There is a gross imbalance in the process.

Jurists have addressed this with concern and in several countries criminal contempt proceedings against 'scandalising the Court' are seldom initiated. The Report of the Law Commission (UK) referred to above says:

> *"Nevertheless, there is something inherently suspect about an offence both created and enforced by judges which targets offensive remarks about judges."*
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> ** ** **
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> *"The offence of scandalising the court is in principle an infringement of freedom of expression that should not be retained without strong principled or practical justification."*

Thus, the offence of scandalising the judiciary as a form of contempt of court was abolished by United Kingdom in 2013. The United States Supreme Court has refused to punish for "scandalising the court" unless the publication creates a "clear and present danger" to the administration of justice. Though India has not abolished the offence, would it not be incongruous with the fundamental right to free speech, if expression of opinions made in public interest and concern for the Rule of Law are held to be contemptuous? There is no discussion in the judgment as to how the action is found to be "malicious". If the facts/ reports, etc. detailed in the reply affidavit exist, how can an opinion based thereon lack bona fides, though the opinion may be divergent from what the judges may think? The reply affidavit (142 pages) and the facts and circumstances given therein providing the basis for the respondent's opinion have not been discussed nor has the opinion been held to be unfounded.

Yet the Court exercised its constitutional power to find him guilty. In so doing it rejected all his objections to the listing of the case, to the hearing by the Bench presided by Hon'ble Mr.Justice Arun Mishra and non-supply of the administrative order for listing of the case or a copy of the complaint itself. Such objections are material while defending a person's liberty. Though the Supreme Court has held that it is not bound by the Contempt of Courts Act and the procedure can be summary, a fair procedure is essential for a just decision.

Since the judgment does not provide answers to several questions regarding adherence to procedural safeguards and there is no means of our intervening in the case, we deem it necessary to raise these issues before you. We do so because the judgment will be a precedent for all Courts to follow in future. Given the circumstances that give the impression that Prashant Bhushan is singled out for his opinion, when several others have expressed similar views, it was absolutely necessary to adhere to procedures to avoid any allegation of 'bias', which he raised.

Questions regarding procedure:

a. Even if the proceedings are summary, can the conduct of the proceedings for criminal contempt be left to the vagaries of the individual judge(s) who hear the matter, particularly when the Court acts both as a prosecutor and the judge and when the life and liberty of the respondent is at stake? In order to ensure a fair and just prosecution, should not the Court, as an institution, codify the procedure

and strictly adhere to the same, so that the respondent has adequate notice of how to proceed?

b. Should adherence to procedure and principles of natural justice not be mandatory before finding a person guilty of a crime impacting right to life guaranteed under Article 21, especially when the Supreme Court acts as both the trial Court and the final Court?

c. When the contemnor had raised four preliminary objections – non-furnishing of administrative orders of the Court, non-furnishing of Maheshwari's complaint, likelihood of bias and a hearing in open Court after resumption of physical court hearings- should not the Bench hear each of these objections, pass a reasoned order on each objection and enable the respondent to prepare his defence thereafter?

d. When the respondent had filed only a preliminary reply and expressed a handicap in raising a proper defence, should the case not have been posted for a final reply affidavit and evidence, if any?

e. Does not the summary rejection of all the preliminary objections raised by the respondent and taking up the case for final hearing on the same day in haste create an oppressive atmosphere for the respondent and deny a fair hearing?

f. When the criminal contempt proceedings are criminal in nature and the Supreme Court Rules to Regulate Contempt Proceedings, 1975 contemplate third party affidavits, examination of witnesses and documents, should not the respondent be afforded an opportunity to lead evidence, unhampered by limitations in a virtual hearing?

g. Can the Court conclude that the respondent was motivated by malice without providing the respondent the opportunity of proving otherwise through evidence?

h. Can the Bench, in the absence of an administrative order by the Master of the Roster, suo motu take up for hearing the case involving the second tweet dated 27.06.2020 concerning the role of the Supreme Court and the last four CJIs?

i. When the offence alleged is one of criminal contempt, should not specific charges be framed and the contemnor afforded an adequate opportunity to respond to each of those charges?

j. Though the Court can take suo motu cognisance of any publication, can the Registrar General ignore the Supreme Court Rules and take on record a defective petition filed without the Attorney General's sanction? It is such action of the Registrar General, which is in breach of the Court's Rules that has resulted in the instant case.

k. When the contemnor has referred to an incident of impropriety by the presiding Judge, Hon'ble Mr.Justice Arun Mishra (para 92 of the reply affidavit), would it not have been appropriate to pass a reasoned order for rejecting the request to refer the matter to another Bench, lest it appear that there is an element of personal bias, especially when the respondent through a formal letter to the Hon'ble Chief Justice of India, also made the same request.

l. Should not the view of the Attorney General be ascertained, after notice had been issued to him and he was present in Court?

In this context, we are compelled to refer to the Report of the Law Commission (UK) on Contempt of Court : Scandalising the Court (2012) which says,

> *"..enforced silence is likely to create more ill-feeling than the original publication, not least the suspicion that judges are engaged in a cover-up and unfairly suppressing freedom of expression. A prosecution gives further publicity to the offending allegations by bringing them back to public attention after memory of them may have begun to fade."*

Unfortunately that is precisely what has happened post the decision.

A Former Chief Justice of India, R.M.Lodha has commented on this judgment that "*the virtual court system initiated to urgently to hear and to protect personal liberty, was actually impairing somebody's liberty*." [The Hindu, dated 15.08.2020]

We request the Hon'ble Judges of the Supreme Court to consider these issues, since the judgment deals with contempt of the Supreme Court and not that of any individual judge. The Court collectively should act to restore public confidence by showing sagacity and fairness in contempt proceedings against "scandalising the court". It must be made clear that criticism of the judiciary based on opinions founded on facts/reports and expressed in public interest cannot be held to be mala fide. Otherwise not only members of the Bar but also of the public, who wish to engage actively in discharging their constitutional obligations will be under a constant fear of being punished for contempt that too through a summary action that is oppressive and unjust.

We do hope our concerns will be duly addressed before any further action is taken for a criminal contempt of scandalising the court.

Signed by

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